Supreme Court, U.S.
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No. 02-515

IN THE
Supreme Court of the United States

DOUGHBOY RECREATIONAL DIVISION OF HOFFINGER INC., HOFFINGER INDUSTRIES,
Petitioners,

v.

KENNY COYLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

REPLY BRIEF

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I. INTRODUCTION

Coyle's Brief in Opposition to this Petitioner's Petition for Writ of Certiorari, and the arguments and conclusions contained therein, ironically provides further support for granting the Petition. In opposing the petition, Coyle has embraced an incorrect view of preemption under the Consumer Product Safety Commission which requires further examination by this Court. Coyle's "defense" of the due process aspects of the proceedings below is equally deficient and underscores the necessity of further examination of the trial court proceedings in this case. As briefly discussed below, the Petition should be granted so that this Court can correct the grave errors committed by the state court below and reaffirm the fundamental importance of the right to a full cross-examination to the right to a fair trial under due process analysis.

II. COYLE'S BRIEF IN OPPOSITION HAS FAILED TO ADDRESS PETITIONER'S PREEMPTION ARGUMENT

Coyle has, somewhat characteristically, missed the point of petitioner's preemption argument. In making the blanket – and completely unsupported - statement that there can be no express or implied preemption of pools under the Consumer Product Safety Commission's standards regarding slides, Coyle unwittingly echoes the incorrect conclusions of law reached by the Ninth Circuit Court of Appeals in Leipart v. Guardian 234 F.3d 1063 (9th cir. 2000) and further illustrates why certiorari should be granted in this case. That Coyle makes such an assertion without bothering to provide factual or legal support for it should speak volumes to this Honorable Court, particularly given that Coyle makes this argument without even attempting to address or acknowledge the fact that the Consumer Product Safety Commission specifically rejected a requirement that slides not be placed with pools, the very

argument Coyle made in this case – In fact, Coyle's theories in the court below are directly contrary to the Consumer Product Safety Commission's determinations: that pool slides are permitted to be used in connection with pools; that pool slide manufacturers are the appropriate entities to shoulder a duty to warn in connection with the danger associated with slides; and, that the duty to provide warning signs related to the dangers associated with such slides were to be placed only on the slides themselves and nowhere else in the pool area.

Coyle argued for the creation of a common law duty to provide warnings which the Consumer Product Safety Commission considered and rejected as either unnecessary or ill-advised for safety reasons. Coyle's failure to acknowledge the clear conflict between the state standard and the Consumer Product Safety Commission's position, and his refusal to address the legal implications of that conflict, underscores the indefensibility of his position, buttressed as it is by the underlying acceptance of such flawed legal analysis that contained within the Ninth Circuit's decision in Leipart.

For the reasons amplified above, the Court should grant certiorari in this case so that this court may clarify the applicability of preemption analysis to the Consumer Product Safety Commission's standards generally and to the circumstances of this case specifically.

III. COYLE'S BRIEF FAILS TO JUSTIFY THE VIOLATIONS OF PETITIONER'S DUE PROCESS RIGHTS IN THIS CASE

Coyle's defense of the proceedings below with regard to petitioners due process argument is equally bankrupt of any substantive legal analysis. With regard to the pretrial settlement agreement between Coyle and the other trial defendants, the relevant question is whether the failure to

disclose that agreement to the jury and whether the failure of the trial court to allow cross examination on that issue to illustrate bias and prejudice of various witnesses - thereby preventing petitioner from exercising its fundamental right to cross examine witnesses - violates Petitioner's due process. *see* Ellis v. Capps, 500 F. 2d 225 (5th cir. 1974); Nevels v. Hanlon, 656 F. 2d 372 (8th cir. 1981); Greene v. McElroy, 360 us 474 (1959).

The question addressed by Coyle in his Brief in Opposition – whether the pretrial settlement agreement met the technical definition of a "Mary Carter" agreement under Oklahoma Law – was not one of the issues raised by Petitioner in its initial brief. The question with regard to that pretrial settlement agreement and its infection of the proceedings below is whether or not the right to cross examine witnesses is a fundamental right protected by the due process clause of the United States Constitution. If the right to cross examine witnesses is such a fundamental right, the lower court must be reversed, as it is undisputed that the trial court prevented proper disclosure to the jury and prohibited Hoffinger from cross examining any witness on the potential prejudicial effects of the pretrial settlement agreement on those witnesses testimony.

Accordingly, the Court should grant certiorari in order to clarify and underscore the importance of this fundamental right and to prevent such clear violations of due process rights as occurred in this case.

IV CONCLUSION

For the above reasons, and for the reasons set out in the Petition for Writ of Certiorari filed September 30, 2002, Petitioner respectfully requests that this Honorable Court grant the Petition.

Respectfully Submitted,

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